Meridian Asset Management Sdn Bhd v Ong Kheng Hoe & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–1204 OF 2006
JAMES FOONG, KN SEGARA AND ABU SAMAH NORDIN JJCA
14 MARCH 2008

Civil Procedure — Mareva injunction — Application for — Ancilliary relief of tracing order — To provide detailed account where sum of money belonging to plaintiff's clients was subsequently disbursed to — Self-incrimination — Whether would increase defendant's risk of being exposed to criminal charge

Evidence — Privilege — Self-incrimination, against — Effect of tracing order on evidence of self incrimination

The appellant ('the plaintiff') was engaged in the business of asset/fund management. The first respondent ('the defendant') was the plaintiff's employee who held the position as central dealer in the plaintiff. The plaintiff alleged that the first defendant, in breach of his duties, fraudulently utilised, converted, stole and/or misappropriated funds managed by the plaintiff amounting to RM27,606,169.65 over a period of three to five years. And these funds were transferred to the first defendant's sisters: the third and fourth defendants. Further, the plaintiff alleged that the first defendant and his wife, the second defendant, were attempting to abscond with these embezzled monies. The plaintiff filed a civil suit in the High Court against all the defendants and simultaneously applied for an ex parte Mareva injunction against them with ancillary orders which included a tracing order. This was duly granted by the High Court but upon subsequent inter parte hearing, the tracing order was discharged. The appellant urged the court to accept and apply the test enunciated in *Khan v Khan* [1982] 2 All ER 60, to ascertain whether privilege against self incrimination applied to the defendants.

Held, allowing the appeal in part with costs:

(1) What was requested of the first defendant in the tracing order did not increase his risk of being exposed to a criminal charge. The first defendant had already been charged for cheating and falsification of documents. His properties had been seized on the suspicion that they

were secured from monies derived from money laundering. As the authorities had already obtained information from him on the movement of his funds, what he had to disclose in this civil suit was nothing more than what he had already told the authorities who, possibly, had used some of the information to frame the criminal charge against him or may even use them to support the filing of further charges. Therefore, the information requested by the plaintiff in the tracing order added no further weight to what the first defendant was already exposed to. In short, his risk towards this impediment by the disclosure demanded had not materially increased (see para 17).

(2) On the other hand there was no information of whether the second, third or fourth defendants were charged for any criminal offence or that their properties seized and information on the movement of their funds divulged to the authorities. In the light of this, the second, third and fourth defendants would risk self incrimination by the disclosure of the information demanded and such risk must be safeguarded (see para 18).

[Bahasa Malaysia summary

Perayu ('plaintif') mempunyai perniagaan pengurusan aset/kewangan. Responden pertama ('defendan') adalah pekerja plaintif yang memegang jawatan pengedar tengah dalam plaintif. Plaintif menyatakan bahawa defendan pertama, dalam melanggar tanggungjawab-tanggungjawabnya, secara fraud menggunakan, menukarkan, mencuri dan/atau melesapkan wang yang diuruskan oleh plaintif berjumlah RM27,606,169.65 dalam jangkamasa tiga hingga lima tahun. Dan wang ini telah dipindahkan kepada adik-beradik defendan pertama: defendan ketiga dan keempat. Selanjutnya, plaintif mendakwa defendan pertama dan isterinya, defendan kedua, telah cuba melarikan diri dengan wang yang digelapkan tersebut. Plaintif memfailkan satu tindakan sivil di Mahkamah Tinggi terhadap kesemua defendan dan pada masa yang sama memohon satu injunksi Mareva ex parte terhadap kesemua mereka dengan perintah-perintah sampingan yang termasuk satu perintah pengesanan. Ini telah diberikan oleh Mahkamah Tinggi tetapi selepas satu pendengaran inter parte, perintah pengesanan dilepaskan. Perayu memohon supaya mahkamah menerima dan memakai ujian yang dinyatakan di dalam kes *Khan v Khan* [1982] 2 All ER 60, untuk memastikan sama ada perlindungan terhadap pembabitan sendiri terpakai kepada defendan-defendan.

Diputuskan, membenarkan sebahagian rayuan dengan kos:

(1) Apa yang dipohon daripada defendan pertama dalam perintah pengesanan tidak akan menambah risikonya dalam mendedahkannya

kepada tuduhan jenayah. Defendan pertama telahpun dituduh dengan penipuan dan pemalsuan dokumen-dokumen. Selain dari itu, hartanahnya telah dirampas kerana disyaki bahawa ia telah diperolehi dengan wang haram. Oleh kerana pihak berkuasa telah memperolehi maklumat darinya mengenai pergerakan wangnya, apa yang ia perlu didedahkan di dalam tindakan sivil adalah tidak lebih daripada apa yang telah diberitahunya kepada pihak berkuasa, yang, berkemungkinan, telah menggunakan maklumat tersebut untuk merangka tuduhan jenayah terhadapnya atau mungkin menggunakannya untuk menyokong pemfailan pertuduhan lanjut. Dengan itu, maklumat yang dipohon oleh plaintif dalam perintah pengesanan tidak memberi kesan kepada apa yang defendan pertama terdedah. Pendek kata, risiko dalam menghalang pendedahan ini tidak bertambah secara material (lihat perenggan 17).

(2) Sebaliknya, tiada maklumat sama ada defendan kedua, ketiga dan keempat telah dituduh untuk sebarang kesalahan jenayah atau hartanah mereka dirampas dan maklumat mengenai pergerakan wang yang telah didedahkan kepada pihak berkuasa. Dengan itu, defendan-defendan kedua, ketiga dan keempat terdedah kepada pembabitan diri dengan pendedahan maklumat yang dituntut dan risiko sebegini perlu dijaga (lihat perenggan 18).]

Notes

For cases on application for Mareva injunction, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4743–4748.

For cases on privilege against self-incrimination, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2171–2180.

Cases referred to

Khan v Khan [1982] 2 All ER 60 (folld)

PMK Rajah v Worldwide Commodities Sdn Bhd & Ors [1985] 1 MLJ 86 (refd)

Riedel-de Haen AG v Liew Keng Pang [1989] 2 MLJ 400 (refd)

Legislation referred to

Evidence Act 1950 s 132(1)

Forgery Act 1913 (UK)

Theft Act 1968 (UK)

Appeal from: Suit No D8(D6)–22–1394 of 2005 (High Court, Kuala Lumpur)

Gideon Tan (Vincent Tan with him) (Gideon Tan Razali Zaini) for the appellant.

Kamarul Hisham Kamaruddin (Hasnal Rezua Merican with him) (Kamarul Hisham & Hasnal Rezua) for the respondents.

James Foong JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal against the decision of the High Court dated 18 October 2006 in respect of an application by the plaintiff for principally a Mareva injunction with ancillary orders. One of the ancillary orders requested (prayer (f)) in the plaintiff's application is what is generally known as the tracing order. It is worded in this form:

> all the defendants herein, respectively shall by way of an affidavit to be filed and served seven days after this order has been served provide a detailed account of to whom and where the sum of RM27,606,169.65 which is money belonging to the plaintiff's clients was subsequently disbursed to.

[2] The High Court after hearing the plaintiff's application inter parte, discharged this tracing order, thus this appeal.

GROUND FOR REFUSAL BY THE HIGH COURT

[3] As no ground of decision is provided by the High Court for discharging this tracing order, we have to rely on the appeal record and the submissions of the parties to ascertain the rational for this discharge. We believed it was based on the claim by the defendants that they are entitled to the privilege against self incrimination ie that by disclosing what is requested of them in the tracing order may criminate them to criminal offence.

BACKGROUND FACTS

[4] For ease of reference, we shall refer to the parties in this judgment in their original capacity: plaintiff and defendants respectively.

[5] The plaintiff is and was at all material times engaged in the business of asset/fund management. The first defendant was the plaintiff's employee who held the position as central dealer in the plaintiff. The plaintiff alleged that the first defendant, in breach of his duties, fraudulently utilised, converted, stole and/or misappropriated funds managed by the plaintiff amounting to RM27,606,169.65 over a period of three to five years. And these funds were transferred to the first defendant's sisters: third and fourth defendants. Further, according to the plaintiff, the first defendant and his wife, the second defendant, are attempting to abscond with these embezzled monies.

[6] On 26 September 2005, the plaintiff filed a civil suit in the High Court at Kuala Lumpur against all the defendants and simultaneously applied for an ex parte Mareva injunction against them with ancillary orders which included the tracing order. This was duly granted by the High Court but as disclosed, upon subsequent inter parte hearing, the tracing order (prayer (f) in the plaintiff's application) was discharged.

LEGAL TEST TO BE APPLIED

[7] Accepting that this privilege against self incrimination survives in our common law, and the exception to this as provided in s 132(1) of the Evidence Act 1950 is not applicable to the defendants since they are not considered as 'witnesses' within the meaning of this section — see *PMK Rajah v Worldwide Commodities Sdn Bhd & Ors* [1985] 1 MLJ 86 and *Riedel-de Haen AG v Liew Keng Pang* [1989] 2 MLJ 400), the appellant urged us to accept and apply the test enunciated in *Khan v Khan* [1982] 2 All ER 60, to ascertain whether such privilege applies to the defendants.

[8] The test laid down in *Khan v Khan* can be derived from the judgments of Stephenson LJ and Griffiths LJ when they dismissed the appeal before them. Stephenson LJ said:

> So far I have assumed that compliance with the order would tend to expose the first defendant to the risk of criminal proceedings or would materially increase that risk. But I do not consider that the first defendant is entitled to the benefit of so unrealistic an assumption ... He would already be exposed to the risk of criminal proceedings for theft and perhaps forgery, and what he may have to say about the subsequent disposal of the £40,000 adds nothing of substance to that existing risk.

[9] Griffiths LJ added:

> For the purposes of assisting the plaintiff to trace the money, it is of the utmost importance that the first defendant should be required to swear an affidavit setting out what has become of it since it entered the account of his company. As the first defendant admits that he paid the £40,000 to the second defendant company, any information that he can give about the subsequent whereabouts or use of the money cannot add a pennyweight to the strength of the criminal case against him. Accordingly, in my opinion to require him to swear the affidavit in the form ordered by the judge would not tend to incriminate him either in the sense of setting up a case against him or strengthening an already existing case.

[10] In essence, this proposition amounts to this: if there is evidence that the defendant is already exposed to the risk of criminal proceeding then the demand for disclosure under the tracing order could not materially add to the existing risk faced by the defendant; thus such privilege would not apply.

We find this proposition rational for application to this instant case. Further, we are of the view that there should be no distinction in the application of this proposition in an application for a tracing order made under a Mareva injunction with that made with an Anton Pillar order.

[11] The factual matrix in *Khan v Khan* is as follows: The plaintiff gave blank signed cheques to the first defendant allegedly for the purpose of paying on his behalf the balance of the purchase price for a property purchased by him. Instead of paying on behalf of the plaintiff the balance of the purchase price, the first and second defendants used the money for other purposes. The first defendant had made out these cheques for £40,000 in favour of the second defendant, a company controlled by him. This prompted the plaintiff to bring an action against these two defendants for damages for breach of trust, as well as for the return of the money including how it was applied. Before the case was heard, the plaintiff obtained an ex parte tracing order against both these defendants. These defendants applied to set it aside in the High Court. They were unsuccessful. They appealed to the Court of Appeal and their appeal was dismissed. At the hearing in the Court of Appeal, the first defendant argued that if the tracing order is allowed to continue, it would incriminate him for offences under the Theft Act 1968 and Forgery Act 1913.

APPLICATION OF TEST TO THE FACTS

[12] Though not disclosed in the affidavits of the parties, from the submission of the defendants at the hearing in the court below, the following information are revealed.

[13] Paragraph 1.4 of the defendant's written submission says:

> It is an undisputed factual matrix relevant to this application that the first defendant has since the inception of this application been charged with the total of 60 charges, being, 30 charges under s 420 of the Penal Code (cheating) and 30 charges under s 471 of the Penal Code (using a forged document as genuine).

[14] Then in para 1.5 of the same submission:

> It is further undisputed that investigation has commenced under the Anti-Money Laundering Act 2001 ('AMLA') for possible offences therein, and that acting under powers of investigation (ss 44, 45(2), and 51(1) AMLA), the prosecution has proceeded to seize certain moveable and immovable properties belonging to the first defendant, suspected to have been concerned in, or being the subject matter of, the offence under the said Act.

[15] And finally in para 1.6 of the same submission: A

> It is undisputed that investigation has begun under the Securities Commissions Act 1993 ('SCA'), and Securities Industries Act 1983 and that from 8 November 2005 to 11 November 2005, the first defendant's statements have been recorded under s 134(1)(b) of the SCA 1993 and that certain information regarding details of his bank accounts and statements have been ordered to be produced under s 128(5) SCA 1993 on 14 November 2005. B

[16] By these revelations, it is our view that what is requested of the first defendant in the tracing order does not increase his risk of being exposed to a criminal charge. The first defendant has already been charged for cheating and falsification of documents. On top of that, his properties had been seized on the suspicion that they were secured from monies derived from money laundering. Prior to this, the authorities had obtained information from him on the movement of his funds. Thus, what he has to disclose in this civil suit is nothing more than what he has already told the authorities who, possibly, had used some of the information to frame the criminal charge against him or may even use them to support the filing of further charges. Therefore, the information requested by the plaintiff in the tracing order adds no further weight to what the first defendant is already exposed to. In short, his risk towards this impediment by the disclosure demanded has not materially increased. C D E

[17] However, on the other hand, we cannot say the same of the other defendants. They are not in same situation as the first defendant, or at least we have no knowledge of. There is no information of whether the second, third or fourth defendants were charged for any criminal offence or that their properties seized and information on the movement of their funds divulged to the authorities. All the information we have is of the first defendant. Very little is disclosed of these other defendants. In the light of this, we are of the view that the second, third and fourth defendants do risk self incrimination by the disclosure of the information demanded and such risk must be safeguarded. F G

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CONCLUSION

[18] For reasons aforesaid, we allow this appeal in part. The order of the High Court dated 18 October 2006 relating to the discharge of the tracing order is set aside in respect of the first defendant. This order remains effective against the other defendants. I

A **[19]** There shall be costs for this appeal against the first defendant to be paid to the plaintiff. Deposit for this appeal to be refunded to the plaintiff.

Appeal allowed in part with costs.

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Reported by Sally Kee

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